**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**SPECIAL CRIMINAL APPLICATION No. 939 of 2007**

**For Approval and Signature:**
**HONOURABLE MR.JUSTICE M.R. SHAH**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**SURENDRA V. GAMI - Applicant(s)**
**Versus**
**STATE OF GUJARAT & 1 - Respondent(s)**

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**Appearance :**
MR RS SANJANWALA for Applicant(s) : 1,
MR MR MENDGE, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 1,
MR PRANAV G DESAI for Respondent(s) : 2,

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**CORAM : HONOURABLE MR.JUSTICE M.R. SHAH**

**Date : 07/08/2007**

**ORAL JUDGMENT**

1. Rule. Shri M.R.Mengde, learned APP waives service of rule on behalf of the respondent No.1 – State and Shri Pranav G. Desai, learned advocate waives service of rule on behalf of the respondent No.2 – original complainant.

2. By way of this petition under Articles 226 and 227 of the Constitution of India r.w. Section 482 of the Criminal Procedure Code, the petitioner – original accused No.3 has prayed for an appropriate order quashing and setting aside criminal complaint No.889/2005 so far as the petitioner is concerned pending in the Court of learned Chief Judicial Magistrate, Surendranagar.

3. A criminal complaint No.889/2005 is filed by the respondent No.2 herein against the petitioner – original accused No.3 and others in the Court of learned Chief Judicial Magistrate, Surendranagar for the offence under section 138 of the Negotiable Instrument Act; 1881 (hereinafter referred to as “the N.I.Act” for short) alleging inter alia that the original accused No.1 is the Limited Company and accused Nos. 2 and 3 respectively are the Managing Directors & Directors of the said company. It is further averred in the complaint that the accused No.1 –

company and the accused Nos.2 and 3 have taken a loan from the complainant bank and a huge amount was due and payable by them to the bank and as the same was not paid, the bank had filed Recovery Application No.46/2000 before the Debts Recovery Tribunal, Ahmedabad and the said recovery application was placed before the Lok-Adalat on 19.3.2005 and there was a settlement and accused No.2 remains present before the Lok-Adalat and it was agreed to pay Rs.35 Lacs in all towards full and final settlement of the account and the dues of the complainant bank and accordingly on payment of Rs.35 Lacs, it was decided to issue No Due Certificate. It is further averred and alleged in the complaint that accordingly original accused No.2 gave 3 cheques in all of Rs.10 Lacs dated 31.3.2005 of the original accused No.1 – company and it is alleged that the original accused Nos.2 and 3 have given assurance that as and when the said cheques are deposited, the same will be honoured. It is submitted that all the aforesaid 3 cheques were deposited on 20.4.2005,

however, all the cheques came to be dishonoured and returned with an endorsement "**Fund Insufficient**". It is further averred in the complaint that thereafter again at the request of the original accused, the said cheques were redeposited and again the said cheques came to be returned with an endorsement **"Insufficient Fund"** and therefore, the complainant has served statutory notice upon the accused persons. It is further averred that the accused persons have given evasive reply and have not made the payment towards the aforesaid cheques in question and therefore, they have committed offence under section 138 of the N.I.Act and therefore, the aforesaid complaint has been filed. In the said complaint, the learned Chief Judicial Magistrate, Surendranagar issued summons upon the petitioner and other accused for the offence under section 138 of the N.I.Act and therefore, the petitioner has preferred present application for quashing and setting aside the aforesaid complaint.

4. Shri R.S.Sanjanwala, learned advocate appearing for the petitioner – original accused No.3 has vehemently submitted that it is an admitted position that so far as the petitioner is concerned, he has already resigned as Director since 15.10.2003 i.e. much before the issuance of the aforesaid cheques by the company and therefore, the petitioner cannot be held liable for returned / dishonour of the aforesaid cheques in question. In support of his submission, he has replied upon Form No.32 – Annexure - B to the petition. It is further submitted that even the petitioner was not signatory to the settlement before the Lok – Adalat and the petitioner was shown as a guarantor in the said recovery application and the petitioner is arrayed accused in the impugned complaint as a Director though at the relevant time the petitioner was not the Director of the company and is guarantor of the loan obtained by the original accused No.1 and therefore, it is submitted that the impugned complaint against the petitioner for the offence

under section 138 of the N.I.Act is nothing but abuse of process of law, which requires to be quashed and set aside.

5. Shri Pranav G. Desai, learned advocate appearing for the respondent No.2 – original complainant is not in a position to dispute that the petitioner has resigned as a Director since 15.10.2003, however, he has submitted that the aforesaid 3 cheques were issued and/or given to the bank pursuant to the settlement before the Lok-Adalat in a recovery application in which the petitioner was also a party as a guarantor and the cheques in question were issued with the knowledge of the petitioner and therefore, it is requested not to exercise extra ordinary powers under section 482 of the Criminal Procedure Code to quash and set aside the complaint in question and it is requested to dismiss the present application.

6. Heard the learned advocates appearing on behalf of the respective parties.

7. It is not in dispute that the cheques in question were issued by the original accused Nos.1 and 2 on 31.3.2005. It is an admitted position that the petitioner has resigned as a Director since 15.10.2003 which is also proved on considering Form No.32. Not only that but in the reply to the statutory notice also it was specifically submitted by the petitioner that at the relevant time, he was not a Director of the company who has issued the cheques and that he has already resigned as a Director since 15.10.2003 i.e. much before the issuance of the cheques in question. On bare reading of the complaint and the averments and allegations made in the complaint it appears that the petitioner is arrayed as an accused as a Director by further submitting that the settlement was entered into between the parties in the Lok-Adalat in a recovery application in which the petitioner was a party as a guarantor and the said Lok-Adalat was before the Debts Recovery Tribunal, Ahmedabad and it was agreed by the

original accused No.2 as a Managing Director of the company to settle the dues and it was agreed to pay Rs.35 Lacs towards full and final settlement and cheques were issued by the original accused No.2 within the knowledge of the petitioner. Merely because, the cheques in question are issued within the knowledge of the person, he cannot be held liable for the offence under section 138 of the N.I.Act, more particularly, when he is neither the signatory to the cheque nor having any position in the company as admittedly the petitioner has resigned as a Director since 15.10.2003. If there are any other allegations against the petitioner and/or cause of action against the petitioner, it will be open for the original complaint to initiate the same, however, in the facts and circumstances of the present case, it cannot be said that the petitioner has committed any offence under section 138 of the N.I.Act. On bare reading of the averments and allegations in the complaint, it cannot be said that the ingredients for the offence under section 138 of

the N.I.Act are satisfied so far as the petitioner is concerned. Under the circumstances, to continue the said criminal proceedings against the petitioner by way of aforesaid criminal case would be abuse of process of law and therefore, it is a fit case to exercise powers under section 482 of the Criminal Procedure Code to quash and set aside the impugned complaint so far as the petitioner is concerned.

8. For the reasons stated above, petition succeeds. The impugned complaint being criminal case No.889 of 2005 pending in the Court of learned Chief Judicial Magistrate, Surndranagar for the offence under section 138 of the N.I.Act is hereby quashed and set aside so far as present petitioner – original accused No.3 is concerned. Rule is made absolute to the aforesaid extent.

[ M.R.Shah, J.]

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